Supreme Court, U
FILED
01 511 MAY 14 2001
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC C. HANSEN – PETITIONER

VS.

CALDWELL DIVING COMPANY., INCORPORATED; EMPLOYER'S INSURANCE OF WAUSAU; UNITED STATES DEPARTMENT OF LABOR, Division of Longshore Harbors Workers; BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR

–RESPONDENT (S)

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE 4TH CIRCUIT

APPENDIX

ERIC C. HANSEN

389 SOUTH GREEN STREET

TUCKERTON, NEW JERSEY 08087

(609) 296-4172

68 pp

APPENDIX A

IN THE COURT OF COMMON PLEAS FOR THE
FOURTH CIRCUIT
CASE NO. 93-07-1926

STATE OF SOUTH CAROLINA	)	ORDER OF
COUNTY OF BEAUFORT	)	DISMISSAL
	)	WITH
Eric C. Hansen,	)	PREJUDICE
Plaintiff	)	
v.	)	
Caldwell's Diving Co., Inc.	)	
And Cargo Gear, Inc.,	)	
Defendants.	)	

It appearing that the Plaintiff and Defendants have settled and compromised their differences and it is, on motion of CLAWSON & STAUBLES; LLC attorneys for the defendant and with the consent of Charles H. Raley, Jr. attorney for the Plaintiff.

ORDERED, ADJUDGED AND DECREED that the above case be dismissed and ended, with prejudice, and the causes of action therein sued upon be forever barred. It is,

FURTHER ORDERED, ADJUDGED AND DECREED that each party bears his or its own costs, disbursements and attorney fees.

AND IT IS SO ORDERED

L Henry McKellar

HONORABLE L. HENRY MCKELLAR

Beaufort, South Carolina

June 12, 1996

Appendix B

U.S. DEPARTMENT OF LABOR
Office of Administration Law Judges
2600 Mt. Emphraim Ave.
Camden, New Jersey 08104

In the Matter of	:	
Eric C. Hansen,	;	
Claimant	:	Case No: 97-LHC-02304
v.	:	OWCP No: 6-137867
CALDWELL DIVING	:	
COMPANY INC.,	:	
Employer	:	
And	:	
	:	
EMPLOYER'S INSURANCES		
OF WAUSAU,	:	
Carrier	:	

Appearances

Michael T. Collins, Esq.
For the Claimant

Stephen E. Darling, Esq.
For the Employer/Carrier

Before: Ainsworth H. Brown
Administrative Law Judge

DECISION AND ORDER--- DENYING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers Compensation Act, as amended, 33 U.S.C. 901, et seq., (hereafter the LHWCA)[1] and the regulations promulgated thereunder. A hearing was held before me in Camden New Jersey on December 18, 1997 and April 20, 1998 at which time the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the December portion of the hearing Claimant's exhibits 1 through 12, 14 through 16, and 24 through 181 and Employer's exhibits 1 through 29 were admitted into the record.[2] During the April hearing CX 198 through 206 and EX 30 were admitted. Upon conclusion of the hearing the due date of June 22, 1998 for closing arguments was established. Employer's briefs were received on June 19 and Claimants brief arrived on June 22.

---

[1] All statutory references herein refer to Title 33 of the United States Code unless otherwise indicated, and are designated by section number only.

[2] The following references appear herein: "CX" for Claimant's exhibits,"EX" for Employer's exhibits, "TR1" for the December 18 hearing transcript and "TR2" for the April 20 hearing transcript.

CX 182 through 197 were submitted by Claimant at the December 18 hearing without prior notice or submission Employer's Attorney, and I deferred their status as exhibits for post-hearing consideration by Employer. (TR at 72-79) In light of correspondences received from the latter on December 30, 1997 and January 9, 1998, CX 182, 192, 193, 195 and 196 are admitted. CX 183 through 187 are copies of incomplete forms, manuals and legal resources As with CX 13 and CX 17 through 23, these proposed exhibits are not evidence in this matter, and are excluded from the record. The relevance of CX 188 and 197 is not apparent, and they are hereby excluded as well CX 189 through 191, and CX 194 are admitted upon consideration of the relevance of their contents to testimony rendered at the December Hearing and Employer's receipt and post-hearing consideration of these documents.

I. Statement of the Case

Claimant, a commercial diver working on a barge in Battery Creek, South Carolina, was struck by a crane boom while tending the air supply lines of a submerged diver. After being hospitalized for approximately three and a half weeks, he returned to his home in New Jersey. He underwent two operations on his intestines and one upon his right knee, and

received two biopsies. (TR1 at 96-98) In approximately February 1992 he was informed by two physicians that his orthopedic condition had maximally improved. (TR1 at 99) He was never informed that his gastrointestinal tract injuries had reached plateau.

On November 17, 1993 Mr. Hansen sued Employer and Cargo Gear, Inc. (a company that performed maintenance on the crane) under, inter alia, 46 U.S.C. § 688 et seq. (hereafter Jones Act). (TRI at 103: EX 8). Eventually he settled the case for $181,160.04 for the compensation benefits it paid Claimant. Thus the total value of the settlement was $1,320,325.88. (EX 25). His attorney's fees on the cash proceeds totaled $379,721.91. (CK 18). Interrelated to that agreement, Claimant also signed a document entitled "Application for Approval of Proposed Settlement – Section 8(i)" on June 12, 1996. The $181,160.04 was placed into an escrow account pending approval of this document by the District Director. The document was submitted for approval on or about June 14, 1996. (EX. 25).

By letter of July 15, 1996 the Director stated that he was tolling his approval period due to insufficient information pertaining to Claimant's third party settlement. (EX 29). Claimant subsequently contacted the Director's office and

informed same that he "is not ready to settle his claim under the Longshore and Harborworkers' Compensation Act." (CX 10). The Director therefore "shelved" the 8(i) settlement approval request pending submission of a new petition and Mr. Hansen's agreement to proceed. (CX 10).

II. Stipulations

The parties have stipulated, and, based on the record, I find that:

1) Claimant suffered an accident and was injured on April 17, 1991.
3) Claimant was Employer's employee at the time of the injury.
4) The injury arose within the course and scope of Claimant's employment.
6) Employer was timely notified of the injury on pursuant to SS912 of the Act.
7) Disability resulted from the accident on April 17.
8) Employer paid Claimant $84,456.61 in temporary total and temporary partial disability payments.
9) Claimant's average weekly wage at the time of the injury was $1,187.86.

(TR1 at 31-43)

III. Issues

The issues for adjudication are:

1) Whether Claimant was an "employee" in accordance with the Act, and was thereby subject to its provisions.
2) Whether the putative settlement agreement that he entered into with Employer satisfied the requirements of SS908(i).
3) The nature and extent of Claimant's disability, it present.
4) Whether Claimant is entitled to benefits pursuant to the Act, and, if so, the amount of the benefits to which he is entitled.

IV. Applicability of the LHWCA

The threshold question for my determination is whether this claim is subject to the LHWCA. Claimant argues that he is an employee pursuant to SS902(3) and the rules set forth in *Herb's Welding, Inc. c. Gray* and *OWCP v. Perini North River Associates*, and he is thus entitled to benefits in accordance with the Act. 470 U.S. 414, (1985); 459 U.S. 297, 15 BRBS 62 (CRT 1983). Employer contends that Claimant was a seaman in accordance with the Jones Act, and he is therefore excluded from LHWCA coverage.

I note initially that the SS920(a) presumption that a claim is valid does not apply to the question of whether a claimant is covered by the LHWCA, and therefore the claimant must so prove. *Sedmak v. Perini N. River Assocs.*, 9 BRBS 378 (1978). In order to be entitled to benefits under the Act, a claimant must be an employee whose disability occurred upon the navigable waters of the United States. SS903(a). Further, the Act provides that:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker, but such terms does not include –(g) a master or member of a crew of any vessel . . .

33 U.S.C. SS902(3).

Thus, a claimant under the LHWCA must satisfy situs (of the injury) and status (nature of his work) requirements. *Sanders v. Alabama Dry Dock and Shipbuilding Co.*, 1085, 1087 (11th Cir. 1988). In this instance, I note that the parties do not dispute that Claimant's accident occurred over navigable waters, and therefore the situs test is clearly satisfied. A Claimant's status is determined by his regular employment rather than the work he engaged in at the time of

the accident, since the LHWCA was not meant to provide compensation merely because a claimant was on or upon navigable waters at the time of the injury. *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523, 1527, 1528, (11th Cir. 1990), citing *Herb's Weloding, Inc.*, supra. Additionally, Claimant's job title is not determinative on this issue. *Levins v. BRBS*, 16 BRBS (CRT) 24, 29 (1st Cir. 1984).

Further, a "master or member of a crew," is considered a seaman, who is covered by the provisions of the Jones Act, and not the LHWCA; the two acts are mutually exclusive. SS905; *McDermott Int'l v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT) (1991); *Bodden v. Coordinated Caribbean Transport, Inc.* 369 F.2d 273, 274 (5th Cir. 1966). A seaman is one whose duties contribute to the function of the vessel or to the accomplishment of its mission, and has a connection to a vessel in navigation that is of substantial nature and duration. *Harbor Tug and Barge Co. v. Fapai*, 520 U.S. 548, (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 34 (1995). Duration, however, is merely one element for consideration. Id. The substantial connection requirement is to ensure, *inter alia*, that maritime employees with merely a transitory connection to a vessel in navigation, and hence without regular exposure to the perils of the sea, are not accorded protection by the Jones Act, *Papai, supra*. Moreover, "vessel" is not defined by the

Jones Act and is a fact specific determination. *Ducote v. Keeler & Co.*, 953 F.2d 1000, 1002 (5th Cir. 1992). Broadly speaking, the term refers to "structures designed or utilized for 'transportation of passengers, cargo or equipment from place to place across navigable waters.'" *Bernard v. Binnings Const. Co.*, 741 F.2d 824m 829 – 830 (5th Cir. 1984), *quoting Cook v. Belding Concrete Products, Inc.*, 472 F. 2d 999, 1002 (5th Cir.), *cert. Denied*, 414 U.S. 868 (1973). It is thus necessary to initially determine whether Claimant is a seaman in accordance with the Jones Act.

The following evidence pertaining to this issue appears in the record:

Claimant testified at the hearings held on December 18, 1997 and April 20, 1998. Employer hired Mr. Hansen to serve as part of a three person dive team, in order to facilitate the placement of underwater cable. (TR1 at 94, TR2 at 290). Divers were necessary to accomplish the task. ITR2 at 289 – 290). Mr. Hansen testified that, during the journey from New Gretna to South Carolina, he played no role in the navigation or function of the barge on which he was injured, the Cohen 165 (which was propelled by a tugboat). (TR1 at 156-157, TR2 at 223-224, 228). Rather, he drove to the work site in mid-March and resided in a motel. (TR2 at 224-226).

Operating engineers served as the crew for the tug and barge for the journey. (TR2 at 229-230). Between his arrival and the date of the injury, April 17, Mr. Hansen was on board the Cohen 165 on several occasions in order to prepare the barge for his assignment. (TR2 at 227, 286). This involved maintaining the diving equipment, diving and assisting the other two divers while they were submerged, all performed from or on the Cohen 165. (TR2 at 286-289, 297). Claimant stated that he accessed the barge either by being transported to it by the tugboat, or by boarding the barge at the dock, after the tugboat had "married up to" the barge and directed it dockside. (TR1 at 157).

Claimant was a member of the dive team assigned to the barge. (TR2 at 284-285). On April 17 Claimant was tending the lines, communicating with, and overseeing the safety of a submerged diver. (TR1 at 95, TR2 at 228). The diver was attempting to remove an obstruction in the waterway which hindered navigation of the barge. (TR1 at 94). He was doing so by attempting to hoist the anchor with a crane onto the barge. (TR1 at 94-95). Claimant was stationed on the barge during the task. (TR2 at 227-228). When the crane was activated, the boom detached and struck Claimant. (TR1 at 95). After the accident the tug transported him to a dockside emergency vehicle, and he was brought to Beaufort

Memorial Hospital, where he remained for approximately three and a half weeks. (TR1 at 95-96, TR2 at 232-233).

I find that the uncontested testimony pertaining to this issue was credible and worthy of considerable weight in my evaluation of this matter. The above facts indicate that Claimant was a seaman, and therefore he is not afforded coverage under the LHWCA. Neither party disputed that the Cohen 165 was a vessel, and I find that it was. Whether a craft is a vessel depends upon the purpose of its construction and the business for which it is used. *Burchett v. Cargill, Inc.*, 48 F. 3rd 173, 176 (5th Cir. 1995). "Conventional ships and barges . . . which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while . . . immobilized and secured to land." *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001 (5th Cir. 1973). Crafts which are not vessels are typically used primarily as work platforms, are moored at the time of the accident, and perform transport merely incidentally to their primary function. *Daniel v. Ergon, Inc.*, 892 F.2d 403, 407 (5th Cir. 1990).

No evidence indicates the Cohen 165 was used primarily as a work platform; indeed, the testimony reflects that it was essentially clearing its own path (through the

efforts of the divers) at the time Mr. Hansen was injured, and was thereby engaged in navigation. See *Bernard, supra at 829.* The distance the barge traveled, and its business (transporting and laying cable) shows that transport was primary, rather than incidental, to its function. See *Burchett, supra* at 177. The record is silent as to whether it was immobile at the time of the accident; and even if it were, this factor is not dispositive, as indicated above. On the whole, the record indicates that the Cohen 165 was a barge in the traditional sense, functioned as transport, and engaged in navigation. It was not a stationary platform, as these factors and case law on this issue must typically discern. The parties have not argued otherwise. Consequently, the Cohen 165 was a vessel in accordance with the Jones Act.

There is little doubt that Mr. Hansen furthered the mission of the vessel, i.c., the placement of the underwater cable. I note that "this requirement is very broad . . ." *Chandris, supra* at 368. Mr. Hansen's duty was to facilitate the installation, and to remove underwater obstructions which hindered the movement of the barge and thereby impaired the execution of the mission. His sentiment that his job was critical to the ship's task (i.e. the cable installation) provides ample support for this finding as well. Indeed, by preparing the vessel for the diving work, maintaining the equipment

necessary for the job, assisting another diver, and by diving himself he clearly "furthered the ship's work" in this respect. *Wilander, supra* at 355.

Further, Claimant's uncontested statement that divers (such as himself) were necessary to perform the job that the barge was assigned to accomplish supports the conclusion that his connection to the vessel was substantial in nature. So, too, did his testimony that he performed equipment preparation and maintenance aboard the barge on an essentially daily basis. (TR2 at 224-225, 227, 286-288). Moreover, a "hardhat" diver's work is inherently maritime in nature, requiring regular exposure to the perils of the sea. *Foulk v. Donjon Marine Co., Inc. et al*, 1998 WL 231084 (3d Cir. 1998); *Wallace v. Oceaneering Int'l*, 727 F.2d 427-436 (5th Cir. 1984). As stated, I do not restrict my inquiry to the work Mr. Hansen performed at the time of the injury, but rather, I assess the duties that he was hired to discharge, and indeed had begun to perform. *Chandris, supra* at 362-364. On the whole, his position – admittedly necessary, clearly maritime – leaves no doubt that his connection to the barge was substantial in nature.

Claimant's connection to the Cohen 165 was of substantial duration as well. This assignment, too, must be

based upon the intended employment relationship as a whole, rather than upon a 'snapshot" of Mr. Hansen's activities at the moment of injury. *Foulk, supra.* Although the record does not reflect a precise time period in which the job had to be completed, Claimant stated that laying the "actual cable might have been two, three weeks. It depends on what trouble you run into." (TR2 at 290). Moreover, he began his "set up" work ... preparing and maintaining diving equipment that was stationed on the barge, surveying nearby marshes, diving, assisting divers on the barge and off – 227, 286-287). He did so on a daily basis, with the exception of the several days he returned home to tend to his ill wife. (TR2 at 287-288). Thus, the record conveys that Claimant was performing a job which, depending on the problems which might arise, would have taken approximately seven to eight weeks to complete. This is a substantial period, and these tasks were clearly closely connected to the Cohen 165.

Perini does not advance Claimant's cause. In that instance the Supreme Court opined that a LHWCA claimant satisfies the status requirement if he is injured while working upon navigable waterways, "providing, of course, that he . . . is not excluded by any other provision of the Act." Claimant is excluded by the provision pertaining to crew members of a vessel, as seen above. *McCray Const. V. Director, Office of*

Workers' Comp., 112 F.3d 1025 (9th Cir. 1997) is likewise unavailing. The chief issue in that case was whether the claimant's work constituted maritime employment pursuant to SS902(3), and not whether, as here, the claim was subject to the SS902(3)(g) exception for vessel crew members. Thus, seaman status in accordance with the Jones Act was not addressed, and is only mentioned to support the proposition that a claimant's work should be considered in its entirety when assessing whether his work is maritime in nature. *Id.* At 1031.

The above factors (i.e. substantial connection to the vessel as shown by the nature and duration of his work) are meant to determine whether a claimant "is a member of the vessel's crew or simply a land based employee who happens to be working on the vessel at a given time." *Chandris, supra* at 370. For the aforementioned reasons, I find Claimant was a seaman as defined by the Jones Act, and was therefore a member of the crew of the Cohen 165 in accordance with SS902(3) of the LHWCA. Consequently, he is excluded from coverage by its provisions, and I do not consider the issues enumerated at III. 2) through 4) above.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law and the entire record, Claimant's request for benefits pursuant to the Act is hereby denied.

Ainesworth H. Brown

Ainsworth H. Brown
Administrative Law Judge

Dated: August 7, 1988
Camden, New Jersey

Attorney's Fees

As I have found Claimant is not entitled to benefits, Claimant's counsel is not entitled to an attorney's fee under Section 28(a) of the Act.

APPENDIX C

U.S. DEPARTMENT OF LABOR

Benefits Review Board

P.O. Box 37601

Washington, DC 20013-7601

ERIC C. HANSEN,	:	
Claimant-Petitioner	:	DATE ISSUED: Sep 7, 1999
v.	:	
CALDWELL DIVING	:	
COMPANY INC.,	:	
	:	
And	:	
	:	
EMPLOYER'S INSURANCE		
OF WAUSAU,	:	
Employer/Carrier	:	
Respondents	:	DECISION and ORDER
	:	

Appeal of the Decision and Order – Denying Benefits of Aisnworth H. Brown, Administrative Law Judge, United States Department of Labor.

Michael T. Collins (Law offices of Michael T. Collins), Manahawkin, New Jersey, for Claimant.

Stephen E. Darling (Sinker & Boyd, P.A.), Charleston, South Carolina, for employer/ Carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, And NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefit (97-LHC-02304) of Administrative Law Judge Ainsworth H. Brown rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33U.S>C> SS901 *et seq.* (the Act). We must affirm the findings of face and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Gryllis Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. SS921(b)(3).

Claimant, a commercial diver for employer, suffered work-related injuries to his back, knees and intestines on April 17, 1991, when he was struck by a crane boom while working

aboard the barge COHEN 165 in Battery Creek, South Carolina. At the time of the accident, claimant served as a member of a dive team employed to facilitate the mission of the COHEN 165, which was the installation of underwater cable. Employer voluntarily paid claimant temporary total and temporary partial disability compensation, as well as medical benefits, until January 1994. 33 U.S.C. SS908(b), (e), 907. Previously, on November 17, 1993, claimant had filed a civil action against employer under the Jones Act, 46 U.S.C. SS688; the parties agreed to a settlement of this suit in 1996. Pursuant to this settlement, claimant received $1,139,165.84, plus a waiver of employer's lien of $181,160.04, representing the amount it previously paid in compensation and medical benefits under the Act. This amount was placed in an escrow account, to be disbursed to claimant upon approval of a settlement of his longshore claim under Section 8(i) of the Act, 33 U.S.C. SS908(i). However, after the district director tolled the time upon which approval of the settlement would be made, claimant indicated that he was not ready to settle his claim under the Act. Thereafter, the district director terminated consideration of the Section 8(i) settlement, and claimant's claim was referred to the Office of Administrative Law Judges. The funds held in the escrow account have not been disbursed to either claimant or employer.

In his Decision and Order, the administrative law judge found that the COHEN 165 is a vessel, that claimant's work as a diver furthered the mission of the vessel, and that claimant's connection to the vessel was substantial in nature and duration. Thus, the administrative law judge found that claimant was a "member of a crew" of a vessel under Section 2(3)(G) of the Act, 33 U.S.C. SS908(3)(G)(1994), and thus not entitled to benefits under the Act.

On appeal, claimant challenges the administrative law judge's determination that he is not entitled to benefits under the Act. Specifically, claimant contends that the administrative law judge erred in finding that he had a connection to a vessel that was substantial in either nature or duration. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The sole issue presented by the instant appeal is whether the administrative law judge erred in finding that claimant was a "member of a crew" of a vessel, and thus excluded from coverage under the Act. Section 2(3)(G) of the Act excludes fro coverage "a master or member of a crew of any vessel." 33 U.S.C. SS902(3)(G). The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the

Jones Act is the same as a "master or member of a crew of any vessel" under the Longshore Act. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75 (CRT)(1991); *see also Chandris v Latsis*, 515 U.S. 347 (1995). An employee is a member of a crew if: (1) he was permanently assigned to or performed a substantial part of his work on a vessel or fleet of vessels; and (2) his duties contributed to the vessel's function or operation. *See Harbor Tug & Barge Co. v. Papal*, 117 S.Ct. 1535, 31 BRBS 34 (CRT)(1997); *Perrin v. C.R.C. Wireline, Inc.*, 26 BRBS 76 (1992); *Griffin v. T. Smith & Sons, Inc.*, 25 BRBS 196 (1992). "The key to seaman status is an employment-related connection to a vessel in navigation .... It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Wilander*, 498 U.S. at 354, 26 BRBS at 83 (CRT). The employee must have a connection to a vessel that is substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 525 U.S. at 368; *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

In that instant case, the administrative law judge's finding that the COHEN 165 is a vessel is unchallenged on

appeal. [1] In addition, claimant does not contest the administrative law judge's finding that his duties contributed to the accomplishment of the mission of the COHEN 165. Rather, on appeal, claimant asserts that contrary to the administrative law judge's determination, he lacked a connection to a vessel that was substantial in both its nature and duration. For the reasons that follow, we reject claimant's contentions.

In rendering his decision, the administrative law judge credited claimant's testimony that he played no role in the navigation or function of the COHEN 165 as it traveled from New Jersey to South Carolina, and that claimant drove with employer's diving team to the work site in South Carolina in mid-March 1991 and resided at a nearby motel, as there were no living quarters on the barge. Tr. At 223-226. Accessing the barge either by tugboat or boarding the barge when it was docked, *see id.* At 157, claimant worked on board the COHEN 165 on a daily basis for approximately four weeks prior to his accident, preparing the barge for the assignment of underwater cable installation. The preparation work included setting up

[1] The COHEN 165 is a barge incapable of self-propulsion. Prior to claimant's injury, it was transported by virtue of a tugboat from its port I New Jersey to Battery Creek, South Carolina. It is undisputed that claimant played no part in the navigation of the COHEN 165. Tr. At 223, 227-228.

and maintaining the diving equipment, maintaining the compressor which was stationed on the barge, and surveying the surrounding marshes in advance of the cable installation. *Id.* At 225-227, 286-288. Claimant was also required to perform underwater dives, as well as assist other divers while they were underwater by tending their lines and communication with then over a two-way radio. *Id.* At 228-229, 287. The diving responsibilities involved clearing away underwater obstructions to the cable. *Id.* at 94, 290. Claimant conceded that his work was essential to the completion of the mission of the COHEN 165. *Id.* at 289.

In his decision, the administrative law judge found that claimant's work as a diver was maritime in nature, regularly exposing him to the perils of the sea. Relying on claimant's credited testimony, the administrative law judge found that claimant's work had a connection to the COHEN 165 that was substantial in nature. *See* Decision and Order at 7. Next, the administrative law judge found that claimant's connection to the COHEN 165 was substantial in terms of its duration based on the fact that claimant began his preparation work approximately four weeks prior to his injury, and testified that the actual laying of the cable would have taken two to three weeks. Tr. 290. The administrative law judge found that a period of approximately seven weeks to complete the mission

of the vessel was a substantial duration. *See* Decision and Order at 8. Thus, that administrative law judge determined that claimant was a "member of a crew" of a vessel pursuant to Section 2(3)(G) of the Act, and therefore excluded from coverage under the Act.

We affirm the administrative law judges conclusion, as it is supported by substantial evidence and consistent with applicable law. In *Papai*, the Supreme Court established the following test for determining whether an employee had a substantial connection to a vessel:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Papai, 520 U.S. at 555, 31 BRBS at 37 (CRT). In *Papai*, the Court ruled that a painter who was hired for one day to paint a tugboat was not a seaman, as his assignment on the day of the injury was of a transitory and sporadic

connection to the vessel.[2] *Id.*, 520 U,S. at 559-560, 31 BRBS at 2\39 (CRT). In *Foulk v. Donjon Marine Company, Inc.*, 144 F.3d 252 (3d Cir. 1998), a case which concerned a commercial diver hired for 10 days to work on a crane barge used for the construction of an artificial reef, the United States Court of Appeals for the Third Circuit held that the employee's connection to the vessel was substantial in nature. Recognizing that the employee's work was necessary for the successful completion of the vessel's mission, the court held that commercial divers are protected by the Jones Act as they are regularly exposed to the perils of the sea. *Id.* 144 F.3d at 258-259; *see also Wallace v. Oceaneering Int'l*, 727 F.2d 427, 436 (5th Cir. 1984)(commercial diver, who embodies traditional maritime risk of navigation, has legal protections of a seaman when substantial part of duties are performed on vessels). In the instant case, the administrative law judge's finding that claimant's work was necessary in order for the COHEN 165 to accomplish its mission is supported by claimant's testimony. Moreover, the administrative law judge's finding that claimant's employment as a commercial

[2] At issue in *Papai* was whether the employee, who worked several painting jobs in two and a half months for three different employers, established a substantial connection to a vessel or identifiable group of vessels. The Court held that the relevant inquiry with regard to this issue is whether the vessels are subject to common ownership or control. The Court held that the only common link between the employers, the practice of hiring from the same union hall, was insufficient to establish this element. *Papai*, 520 U.S. at 560, 31 BRBS at 39 (CRT).

diver for employer was maritime in nature, requiring regular exposure to the perils of the sea, is in accordance with law. Accordingly, we affirm that administrative law judge's finding that claimant's connection with the COHEN 165 was substantial in nature.[3]

We next consider claimant's contention that the administrative law judge erred in finding that claimant's connection to the COHEN 165 was substantial in duration, the second part of the second element for seaman status under *Chandris*. In *Chandris*, the Court held that "[i]n evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated by the jurisprudence." *Chandris*, 515 U.S. at 363. In its analysis of whether the employee's connection to the vessel was substantial in duration, the Third Circuit in *Foulk* did not evaluate the employee's connection to the vessel at the moment of injury, but rather, considered his intended

[3] The instant case is distinguishable from *Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff'd in pert. Part*, 46 F.3d 292, 29 BRBS 52 (CRT)(3d Cir. 1995), where the Board affirmed the administrative law judge's finding that the employee was not a member of a crew. In that case, although the employee performed some diving work off barges, his primary work duties related to pier and dock construction, activities covered under Section 2(3) of the Act. In the instant case, claimant worked solely as a diver.

relationship as if he had completed his mission uninjured. *Foulk*, 144 F.3d at 259. In that case, the court reversed the district court's finding that a 10-day relationship was too short to satisfy the durational requirement, holding that it was inappropriate to determine the minimum durational element by an absolute number. The ultimate inquiry, the court held, was whether the employee was a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. The temporal element and the nature of the activities performed, taken together, determine seaman status. *Id.*

In the instant case, claimant worked aboard COHEN 165 for approximately four weeks in preparation for the installation of underwater cable prior to his injury. It is apparent from claimant's testimony that his injury occurred just prior to the actual cable installation. Claimant testified that had he not been injured, he would have worked for another two to three weeks to complete the barge's mission of installing underwater cable. *See* Tr. at 290. The administrative law judge found that a period of approximately seven weeks for the COHEN 165 to complete its mission was sufficiently substantial to satisfy the temporal element for seaman status. In light of the decisions in *Chandris* and *Foulk*, we hold that the administrative law judge properly

found that claimant's work was of sufficient duration to confer seaman status. Accordingly, we affirm the administrative law judge's finding that claimant's connection to the COHEN 165 was substantial in duration, and thus affirm his conclusion that claimant was a "member of a crew" of a vessel and excluded from coverage under the Act.

Lastly, employer, in its response brief, requests that if the Board affirms the administrative law judge's decision, it should issue an order requiring the escrow agent to release the funds held in escrow to employer. Employer's request must be denied, as the Board is without authority to issue an order compelling the release of escrow funds from a Jones Act settlement.[4]

[4] We note that Section 3(e) of the Act, 33 U.S.C. SS903(e), provides that any amounts an employer has paid pursuant to a recovery under the Jones Act shall be credited against the employer's liability under the Act.

BEST AVAILABLE COPY

APPENDIX D

Accordingly, the Decision and Order – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

James F. Brown

JAMES F. BROWN
Administrative Appeal Judge

Malcolm D. Nelson

MALCOM D. NELSON, Acting
Administrative Appeals Judge

U.S. DEPARTMENT OF LABOR

Benefits Review Board

P.O. Box 37601

Washington, DC 20013-7601

ERIC C. HANSEN, ;

Claimant-Petitioner : DATE ISSUED: Feb 23, 1999

v. :

CALDWELL DIVING :

COMPANY INC., :

:

And :

:

EMPLOYER'S INSURANCE

OF WAUSAU, :

Employer/Carrier :

Respondents : ORDER on MOTION for

: RECONSIDERATION

After consideration of claimant's contentions and review of the Board's disposition of this case, no member of the Board has affirmatively voted to vacate or modify the previous Decision and Order herein. Accordingly, the motion

for reconsideration filed by claimant is DENIED. 33 U.S.C. SS921(b)(5); 20 C.F.R. SSSS801.301(c), 802.407(a), 802.409.

By Order of the Board

Thomas O. Shepherd, Jr.
Thomas O. Shepherd, Jr.
Clerk of the Board

CERTIFICATE OF SERVICE

98-1595 Eric C. Hansen v. Caldwell Diving Company
(Case No. 97-LHCA-2304)
(OWCP No. 06.0137867)

I certify that the parties below were served this day.

Feb. 23, 2000
DATE

Thomas O. Shepherd, Jr.
Thomas O. Shepherd, Jr.
Clerk of the Board

Michael T. Collins, Esq.
50 Division St.
Manahawkin, NJ 08050
--Certified

Eric C. Hansen
389 South Green
Tuckerton, NJ 08087
-- Certified

Stephen E. Darling, Esq.
Sinkler and Boyd, PA
160 East Bay Street
P.O. Box 340
Charleston, SC 29402
--Certified

Ms. Carol A. DeFeo, Esq.
Associate Solicitor
U.S. Department of Labor
200 Constitution Avenue, NW
Suite S-4325
Washington, DC 20210
--Certified
202-219-4405, Est. 101

Mr. Richard V. Robilotti
District Director
OWCP-Longshore Division
201 Varick Street
New York, NY 10014

Judge Ainsworth H. Brown
U.S. Department of Labor
2600 Mt. Ephriam Avenue
Camden, NJ 08104

APPENDIX E

ORIGINAL FILED
Nov 30 2000
William F. Walsh, Clerk

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ERIC C. HANSEN, and GAIL A. HANSEN, his wife, Plaintiffs,	:	CIVIL ACTION NO. 00-3805 (MLC)
v.	:	
CALDWELL'S DIVING CO., JAMES D. CALDWELL, MARION K. CALDWELL, THE CALDWELL GROUP, and A through F Individuals and R through Z Companies, Defendants.	:	MEMORANDUM AND ORDER

ENTERED
On
The Docket
On 11/30/00
William T. Walsh , Clerk
By _____
Deputy Clerk

COOPER, District Judge

This matter comes before the Court on defendant's: (1) motion to dismiss the Complaint pursuant to Rule 12(b)(6) and/or Rule 56 of the Federal Rules of Civil Procedure, and (2) motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. For the reasons stated, the motions are granted.

BACKGROUND

Plaintiff Eric C. Hansen ("Hansen") filed a complaint in February 1994 in the Court of Common Pleas for the Fourteenth Judicial Circuit in Beaufort, South Carolina, seeking damages for injuries he sustained in 1991 while working on a crane barge owned by his employer Caldwell's Diving Co., Inc. (the "SC Action"). (Op. filed 5-22-00 at 2). Hansen's South Carolina attorney late retained an attorney in New Jersey to file a similar complaint in this court against Caldwell's Diving Co., Inc., a/k/a/ Caldwell Diving Co., Inc., and Cargo Gear, Inc., Civil Action No. 94-1751 (MLP) (the "NJ Action"), in case defendants successfully moved to dismiss the SC Action on jurisdictional grounds. (Id.) The NJ Action was voluntarily dismissed with prejudice because the defendants did not oppose jurisdiction in South Carolina. (Id.) The SC Action settled in 1996 and an order was entered in 1996 dismissing the SC Action with prejudice. (Id.)

In November 1998, Hansen, proceeding pro se, moved to reopen the NJ Action. (Id. at 3.) This Court granted Hansen's motion. (Id.) The defendants in that action moved to dismiss on grounds of res. judicata. (Id.) The Court treated defendants' motions as motions for summary judgment. (Id.) The Court found that the NJ Action was "nearly identical" to

the SC Action, alleging the same cause of action against the same defendants based on the same set of facts, and that the SC Action had been dismissed with prejudice pursuant to a settlement agreement. (Id.) The Court concluded, therefore, that the NJ Action was barred by res. judicata and granted defendants' motions. (Id.)

Hansen appealed our decision to the Third Circuit. (Id.) On May 12, 2000, the Third Circuit affirmed our decision. (Id.) On May 17, 2000, Hansen moved for default judgment in the NJ Action. (Docket.) On June 23, 2000, the Court entered an order denying Hansen's motion for default judgment, finding Hansen's motion to be clearly frivolous, and notifying Hansen of the possibility of sanctions if further frivolous filings continue.[1] (Order filed 6-23-00 at 1.)

Plaintiffs Hansen and his wife, Gail A. Hansen, initiated this action in this Court on August 7, 2000 against Caldwell Diving Col., Inc., James D. Caldwell, Marion K. Caldwell, The Caldwell Group, and certain unknown individuals and companies. (Compl. Filed 8-7-00). The defendants now move to dismiss the complaint, arguing that the claims raised therein are barred by the doctrine of res.

[1] The Court stated, "The Court hereby provides plaintiff with notice that a pattern of filing frivolous motions might subject plaintiff to monetary sanctions and plaintiff's motions to review by the Court before they may be accepted for filing." (Order filed 6-23-00 at 1 (citations omitted).)

judicata and the applicable statute of limitations. (Defs.' Br. In Supp. of Mot. to Dismiss.) In addition, the defendants are moving for Rule 11 sanctions, arguing that the Complaint is frivolous and warrants the imposition of monetary sanctions to deter Hansen from the further filing of frivolous pleadings. (Defs.' Br. In Supp. of Mot. For sanctions.)

DISCUSSION

The Court will first address defendants' motion to dismiss and will then address their motion for Rule 11 sanctions.

I. Motion to Dismiss

A court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) "only if, accepting all alleged facts as true, the plaintiff is not entitled to relief." Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3D Cir. 1986) (citations omitted). Further, all reasonable inferences that can be drawn from the plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987) (citations omitted). This Court may not dismiss a complaint unless the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson 355 U.S. 41, 45-46 (1957). "The issue is not whether the claimant is entitled to offer

Editor's Note

ORIGINAL PAGINATION IS NOT CONTINUOUS

Pa. 1996) (imposing sanction under Rule 11 analogous to 28 U.S.C. SS1915 in form of injunction prohibiting plaintiff from filing new actions if he has, on 3 or more prior occasions following decision, brought action or appeal that was dismissed on the grounds that it was frivolous, malicious, or fails to state claim upon which relief may be granted); Tidik v. Ritsema, 938 F. Supp. 416, 427-28 (E.D. Mich. 1996) (enjoining plaintiff from filing new actions or pleadings in the court without prior permission of court).

Hansen has previously received a rather stern warning from this Court regarding his persistent filings in connection with the subject of the SC Action and NJ Action. Undeterred, Hansen filed this action, which is based on the same factual scenario as the prior SC Action and NJ Action. Accordingly, the Court concludes that an injunction permanently enjoining Hansen from filing any future claims against the moving defendants in federal court based upon the factual scenario set forth in this and previous complaints without prior leave of the Court is the moat appropriate sanction.[4] Although the Third Circuit has cautioned that an injunction as a sanction should be sparingly used and entered

[4] The Court will not impose a monetary sanction upon Hansen at this time. The Court hereby provides Hansen with notice, however, that the attempted filing of further frivolous pleadings by him related to the subject of this action may subject him to monetary sanctions. *See* Fed. R. Civ. P. 11(c).

IT IS FURTHER ORDERED that defendants' motion for sanctions (no. 7-1 on the docket) be and hereby is GRANTED; and

Plaintiff Eric C. Hansen be and hereby is ENJOINED from filing any further papers related to the subject of this case without prior approval of the district court. Before leave shall be granted to file any papers, Hansen must file a certification or attestation that the claims he wishes to present are new claims never before raised and disposed on the merits by any federal court and that he knows of no reason to believe his claims are foreclosed by controlling law; and

The Clerk of the Court be and hereby is DIRECTED not to accept any filings from plaintiff Eric C. Hansen that have not been screened by the district court; and

Plaintiff Eric C. Hansen is hereby NOTIFIED that the continued filing of frivolous motions may invoke the imposition of monetary sanctions; and

Plaintiff Eric C. Hansen is hereby NOTIFIED that the continued filing of frivolous motions may invoke the imposition of monetary sanctions; and the possible preclusion of her filings without first obtaining leave from the Court; and

The Clerk of the Court shall mail a copy of this Order to plaintiffs by both first class mail and certified mail, return receipt requested.

Mary L. Cooper

MARY L. COOPER

United States District Judge

APPENDIX F

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-1443

ERIC C. HANSEN,

Petitioner

Versus

CALDWELL DIVING COMPANY, INCORPORATED; EMPLOYER'S INSURANCE OF WAUSAU; UNITED STATES DEPARTMENT OF LABOR, Division of Long-Shore Harbors Workers; BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board. (BRB-98-1596)

Submitted: February 8, 2001 Decided: February 13, 2001

Before WILKINS, MOTZ, and TRAXLER, Circuit Judges

Affirmed by unpublished per curiam opinion.

Eric C. Hansen, Petitioner Pro Se, Stephen Edward Darling, SINKLER & BOYD, P.A., Charleston, South Carolina; Laura Jessica Stomski, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Washington, D.C., for Respondents.

Unpublished opinions are not binding precedent in this circuit. See local Rule 36 (c).

PER CURIAM:

Eric C. Hansen seeks review of the Benefits Review Board's decision and order affirming the administrative law judge's denial of benefits pursuant to the Longshore & Harbor Worker's Compensation Act. 33 U.S.C.A. SS901-950 (West 1994 & Supp. 2000). Hansen also appeals the Board's order denying his motion for reconsideration. Our review of the record discloses that the Board's decisiōns are based upon substantial evidence and are without reversible error. Accordingly, we affirm on the reasoning of the Board. Hansen

v. Caldwell Diving Co., Inc., No. BRB-98-1596 (Sept. 7, 1999 & Feb. 23, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX G

U.S. DEPARTMENT OF LABOR

Office of Worker's Compensation Programs

. . . . . .

Eric. C. Hansen

Employee

Caldwell's Diving Co., Inc..

Employer

Wausau Insurance Company

Insurance Carrier

. . . . . .

APPLICATION FOR APPROVAL OF AGREED SETTLEMENT - SECTION 8(i)

OWCP No. 6-137867

The above-named parties make "the following statements of fact and pursuant to the provisions of 33 U.S.C. 908(i) of the Longshore and Harbor Workers' Compensation Act agree upon the following proposed settlement of the employer's liability to the employee for the payment of benefits.

I. DISPUTED ISSUE(S)

Claimant's entitlement to any further compensation and medical benefits; extent of disability, if any; jurisdiction; recovery of claimed lien from third parties.

II. AGREED STATEMENTS OF FACT

1. Date and Description of Incident: Eric Hansen was standing on the deck of barge tending lines when a crane became detached and fell on him at Port Royal, South Carolina, on April 17, 1991.

2. Nature of injury (including degree of impairment and/or disability: Mr. Hansen sustained stenosis of the jejunum, chronic calculous cholecystitis, possible superior mesenteric syndrome secondary to fracture of thoracic vertebrae, injuries to the right knee, facial lacerations and abrasions and contusions of the right hand and left leg.

3. Description of medical care: Initially, the Claimant wa seen and treated at Beaufort Memorial Hospital. After an exploratory laparotomy and repair of other injuries, an operation upon the knee was performed. Following hospitalization, Mr. Hansen was treated by several doctors and physical therapists. The reports of Dr. Frederick Daizell and Dr. Morton Rosenblatt are attached hereto and made a part hereof.

4. Compensation paid: AWW: $1187.86 Rate: $682.14

Dates and Forms:

Temporary total-4/18/91 to 6/8/92 - $40,635.79

Temporary Partial-6/9/92-1/14/94 - $43,820.92

$84,456.71

5. Terms of settlement: The Carrier currently has a lien against Claimant's third party recovery. The third party action against Caldwell Diving Company and Cargo Gear, Inc. is being settled. The settlement amount is $1,139,165.84. The Carrier is waiving its lien and contributing $135,476.00 toward the settlement to obtain a full release and end all claims against the Employer and Carrier. Medical expenses and attorney's fees will be included in the third party settlement.

6. If settlement of medical benefits:

A. Itemization of medical expenses for past three (3) years: Expenses in the past three years have not been significant.

B. Estimate of future medical expenses (include inflation and discount factors): Few, if any, medicals are anticipated.

C. Information regarding collateral sources of medical expenses, if applicable: The third party settlement above mentioned includes future medical expenses..

---

7. Reason for settlement (including disputed issue(s)): The extent of further disability and jurisdiction are hotly disputed. The third party settlement fully compensates the Claimant and waives the repayment of the compensation lien claimed against the potential Jones Act recovery.

8. Claimants date of birth: September 4, 1960

9. Claimant's ability to work (including educational background, present work status, work history, if applicable: A labor market survey of David B. Stein is attached hereto and made a part hereof.

10. Medical reports dated: September 23, 1993 (Dr. Rosenblatt) and September 1, 1993 (Dr.Daizell).

11. Adequacy of settlement: The third party settlement adequately compensates the Claimant for his injuries and includes the waiver of a claimed compensation lien. It further takes into account jurisdictional issues

such as Jones Act seaman status which would exclude LHWCA coverage.

12. Other: The Employer and Carrier hereby expressly reserve the right to withdraw from and/or rescind this settlement agreement for any reason or for no reason prior to approval of this settlement by the Deputy Commissioner or Administrative Law Judge pursuant to Section 8(i)(1) of the Longshore and Harbor Workers' Compensation Act.

Eric C. Hansen 6/12/96

Signature of Employee (Date)

Eric C. Hansen

RALEY & ASSOCIATES, P.C.

By: Charles H. Raley, Jr. 3/20/96

Signature of Attorney for Employee (Date)

(if applicable)

Charles H. Raley, Jr.